

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 5, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP984

Cir. Ct. No. 2012CV525

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

BANK OF AMERICA, N.A. AND NATIONSTAR MORTGAGE LLC,

PLAINTIFFS-RESPONDENTS,

v.

JAMIE BOOTH,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Polk County:
MOLLY E. GALEWYRICK, Judge. *Affirmed.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Jamie Booth appeals an order denying his motion to vacate a judgment of foreclosure and an order for confirmation of sale. Booth argues Bank of America, N.A. failed to give notice of the sheriff's sale within the

six-month redemption period set forth in WIS. STAT. § 846.101.¹ Booth also argues the Bank gave inadequate notice of sale under WIS. STAT. § 815.31(2), asserting a prior version of the statute applied, which required a longer publication period. We reject Booth's arguments and affirm.

BACKGROUND

¶2 Booth executed a note and mortgage on his home in July 2009. The Bank initiated foreclosure proceedings in August 2012, and a judgment of foreclosure was entered in April 2013. The Bank published a notice of foreclosure sale in the local newspaper on December 11, 18, and 25. The Bank was the high bidder at the sheriff's sale held on January 9, 2014.

¶3 Booth opposed the Bank's motion for confirmation of sale and moved to vacate and dismiss the foreclosure judgment. The circuit court granted the Bank's motion and denied Booth's motion. Booth now appeals.

DISCUSSION

¶4 Booth first argues the Bank failed to give notice of the foreclosure sale within the six-month redemption period set forth in WIS. STAT. § 846.101. Booth also argues the Bank gave inadequate notice of sale under WIS. STAT. § 815.31(2). Booth contends a prior version of that statute applied, which required a longer publication period. We reject both of Booth's arguments.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶5 Booth’s first argument is foreclosed by recent precedent. He argues the term “shall” in WIS. STAT. § 846.101 is mandatory, requiring lenders to publish notices of foreclosure sale within the six-month redemption period following entry of the judgment. We rejected the same argument in *Bank of America, N.A. v. Prissel*, 2015 WI App 10, ¶¶1, 12, 359 Wis. 2d 561, 859 N.W.2d 172 (2014), where we explained: “Reading WIS. STAT. § 846.101(2) in context with other sections of WIS. STAT. ch. 846 supports Bank of America’s argument that the statutory language stating notice of a foreclosure sale ‘shall be given’ within the six-month redemption period is directory, rather than mandatory.”²

¶6 Booth alternatively argues the Bank gave inadequate notice of the foreclosure sale. WISCONSIN STAT. § 815.31(2) provides: “A copy of the notice of sale shall be printed each week for 3 successive weeks in a newspaper of the county prior to the date of sale.” Booth contends the 2007-08 version of § 815.31(2) that existed when he executed his note and mortgage should apply, rather than the version that existed when the Bank commenced the foreclosure action. The prior version required publication for six successive weeks, rather than the three weeks’ publication currently required.

² Booth filed a notice of supplemental authority regarding *Bank of New York Mellon v. Carson*, 2015 WI 15, 859 N.W.2d 422 (Feb. 17, 2015). Booth argues Carson is persuasive authority that “shall” should be interpreted as mandatory in WIS. STAT. § 846.101, because Carson held “shall” is mandatory in WIS. STAT. § 846.102.

However, *Bank of America, N.A. v. Prissel*, 2015 WI App 10, ¶¶26-27, 359 Wis. 2d 561, 859 N.W.2d 172 (Dec. 9, 2014), distinguished the rationale that had been set forth in the appellate court decision affirmed in Carson. Moreover, Carson did not cite, much less overrule, the Prissel decision. Accordingly, we are bound to follow Prissel. See *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (court of appeals cannot overrule, modify, or withdraw language from a prior published opinion).

¶7 The “well-recognized rule in Wisconsin jurisprudence is that ‘if a statute is procedural or remedial, rather than substantive, the statute is generally given retroactive application.’” *Trinity Petroleum, Inc. v. Scott Oil Co.*, 2007 WI 88, ¶40, 302 Wis. 2d 299, 735 N.W.2d 1 (quoting *Gutter v. Seamandel*, 103 Wis. 2d 1, 17, 308 N.W.2d 403 (1981)). “If a statute prescribes the method, that is, the legal machinery, used in enforcing a right or remedy, it is procedural.” *Id.*, ¶41. “A procedural law is that which concerns the manner and order of conducting suits or the mode of proceeding to enforce legal rights and the substantive law is one that establishes the rights and duties of a party.” *Id.* (quoting 3A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION, § 67.2 at 104-05 (6th ed. 2001)).

¶8 A change in the publication requirement from six weeks to three weeks is not a substantive change to the rights of the parties. It does not shorten the redemption period or otherwise alter the rights or obligations of the parties under the note or mortgage. Booth’s rights were not altered by applying the shortened publication requirement. Rather, the Bank was permitted to sell the property at any time after six months following the foreclosure judgment, *see* WIS. STAT. § 846.101, and Booth could have redeemed the property at any time during the publication period, regardless whether that period was three or six weeks.

¶9 The statute at issue here is more akin to a notice of claim statute, as opposed to a redemption statute or statute of limitation, as argued by Booth. In *Lins v. Blau*, 220 Wis. 2d 855, 862, 584 N.W.2d 183 (Ct. App. 1998), we held WIS. STAT. § 88.87(2)(c) is a notice of claim requirement, and not a statute of limitation, and explained that “[a] notice of claim requirement is a procedural statute because it sets out conditions precedent to the right to bring a suit.” Similarly, WIS. STAT. § 815.31(2) simply set a condition precedent that the Bank

was required to follow prior to enforcing its right to sell the property. Accordingly, § 815.31(2) is a procedural statute and should be given retroactive effect.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

